

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1240

Modified
Request to Reopen Allowed
No Disqualification

PROCEDURAL HISTORY: On April 14, 2023, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving effective March 19, 2023 (decision # 81706). Claimant filed a timely request for hearing. On June 6, 2023, ALJ Goodrich conducted a hearing at which the employer failed to appear, and on June 7, 2023, issued Order No. 23-UI-227211, reversing decision # 81706 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving unemployment insurance benefits based on the work separation. On June 16, 2023, the employer filed a timely request to reopen the June 6, 2023, hearing. On October 26, 2023, ALJ Adamson conducted a hearing, and on October 30, 2023, issued Order No. 23-UI-239869, allowing the employer's request to reopen, canceling Order No. 23-UI-227211, and affirming decision # 81706 on the merits. On November 8, 2023, claimant filed an application for review with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review allowing the employer's request to reopen is **adopted**. The rest of this decision addresses claimant's work separation.

FINDINGS OF FACT: (1) Peacehealth employed claimant as a medical assistant from July 18, 2022, until March 21, 2023.

(2) The employer expected that their employees would not have inappropriate contact, such as romantic or personal relationships outside of work, with patients. Claimant was aware of this expectation.

(3) Since the beginning of claimant's employment, claimant felt that a patient receiving treatment at the employer's facility was "being inappropriate" toward her. October 26, 2023, Transcript at 20. The patient's conduct included trying to surreptitiously take photos of claimant with his phone "numerous times" after being warned not to, making "sexual comments" toward claimant, and inquiring of at least

one other employee about dating claimant. October 26, 2023, Transcript at 20. Some of claimant's coworkers witnessed this conduct.

(4) On March 15, 2023, the patient initiated contact with claimant via social media after searching for and finding her profile. The profile included claimant's phone number. Claimant responded to the patient that he should not attempt to contact her outside of work and blocked his access to her social media profiles. Claimant did not otherwise have contact with the patient outside of work.

(5) Also on March 15, 2023, the patient was in the reception area of the employer's facility where claimant worked. The patient told a receptionist, and later two other medical providers at the facility, that claimant had contacted him via phone "after work one day. . . offering to bring him a drink." October 26, 2023, Transcript at 14. He stated that claimant then brought him a drink and had her child in the backseat of the car. He further told them that "he had a fairytale relationship happening" with claimant. October 26, 2023, Transcript at 14. According to the patient, the two "had been sexting over the weekend." October 26, 2023, Transcript at 12. The patient then showed the employees a nude photo, purportedly of claimant from a "fetish page" to which claimant had granted him access. October 26, 2023, Transcript at 11-12. One of the employees took screenshots of the nude photo and some of the purported text messages between claimant and the patient, and later presented them to the employer.

(6) On March 16, 2023, claimant was summoned to a meeting with the employer's human resources department to discuss what the patient disclosed to claimant's coworkers. Claimant denied calling, texting, sending photos to, meeting, or otherwise having contact with the patient outside of work, except to block him from her social media. Claimant was suspended from work pending investigation of the matter. The following day, claimant told the employer of witnesses who had observed the patient's behavior toward her, and of witnesses who later were told by the patient that he had "falsified" his earlier statements about claimant having contacted him. October 26, 2023, Transcript at 27. The employer did not contact those witnesses.

(7) On March 21, 2023, the employer discharged claimant for allegedly violating their policy against inappropriate contact with patients.

CONCLUSIONS AND REASONS: Claimant was discharged, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. "As used in ORS 657.176(2)(a) . . . a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee is misconduct. An act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest is misconduct." OAR 471-030-0038(3)(a) (September 22, 2020). "[W]antonly negligent" means indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee." OAR 471-030-0038(1)(c). In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for allegedly having inappropriate contact with a patient. The order under review concluded that claimant was discharged for misconduct because the patient's allegations of inappropriate contact, as conveyed to other employees and, through them, to the employer's witness at hearing, were more persuasive than claimant's first-hand account denying any contact. Order No. 23-UI-239869 at 5. The record does not support this conclusion.

On March 15, 2023, the patient initiated a conversation with claimant's coworkers, essentially boasting that claimant had contacted him outside of work through various means, including in person, to commence a "fairytale relationship" with him. October 26, 2023, Transcript at 14. He offered screenshots to these coworkers purporting to depict portions of text messages between him and claimant, as well as a nude photo purportedly of claimant, likely to convince the coworkers to believe that he was in a relationship with claimant. The patient did not testify at hearing, nor did the coworkers with whom he spoke. The employer's witness at hearing did not have first-hand knowledge of whether claimant had contact with the patient. Therefore, the record evidence of inappropriate contact presented by the employer, including that claimant was a party to the text messages in the screenshot or provided the nude photo to the patient, was offered through two layers of hearsay.

In contrast, during both the employer's investigation and in her testimony at hearing, claimant denied any contact with the patient except for once responding through social media that he should not attempt to contact her. October 26, 2023, Transcript at 19. Claimant also testified to several instances of the patient engaging in inappropriate conduct toward her throughout her employment, supporting her suggestion that the patient had an "infatuation" with her that might motivate him to fabricate the existence of a relationship with her to others. October 26, 2023, Transcript at 20. Claimant also offered hearsay evidence from other employees that the patient later admitted to them that he "falsified" what he had represented about a relationship with claimant. October 26, 2023, Transcript at 27. The employer did not rebut claimant's testimony as to the patient's actions toward her prior to March 15, 2023, or as to the patient later admitting to others to having "falsified" information about claimant having contacted him.

Claimant's first-hand testimony that she had no contact with the patient outside of work and did not send him text messages or give him access to a nude photo is entitled to greater weight than the patient's hearsay account to the contrary, and the facts have been found accordingly. Therefore, the employer has not shown by a preponderance of evidence that claimant had any inappropriate contact with the patient. Accordingly, the employer failed to show that claimant violated their expectation that employees not engage in inappropriate contact with patients.

For these reasons, claimant was discharged, but not for misconduct, and is not disqualified from receiving unemployment insurance benefits based on the work separation.

DECISION: Order No. 23-UI-239869 is modified, as outlined above.

S. Serres and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: December 26, 2023

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

NOTE: This decision reverses an order that denied benefits. Please note that payment of benefits, if any are owed, may take approximately a week for the Department to complete.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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